

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

1366

77-2019

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

~~1977~~ 1977

JOSEPH GENTILE,

Appellant Pro Se

vs.

#T-7049

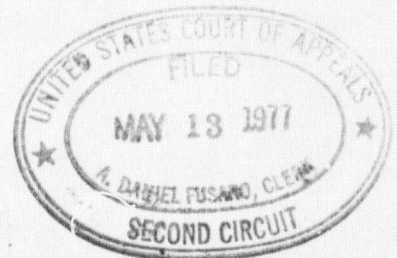
UNITED STATES OF AMERICA,

Appellee

On Appeal from the United States District
Court for the Eastern District of New York

and Appendix
BRIEF OF APPELLANT

JOSEPH GENTILE
Appellant Pro Se
P.O. Box 1000
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17752



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THE ISSUES PRESENTED FOR REVIEW

POINT ONE

The appellant avers that the trial court erred in not permitting the Respondent United States of America to answer the appellant's Petition. The Appellant believes that this court will be persuaded that a sua sponte dismissal of a pro se petition is contrary to the declared law of the Court of Appeals for the Second Circuit and not in the best interest of justice.

POINT TWO

The appellant believes that the trial court erred in considering a dismissed indictment while deciding upon a sentence for the appellant and that the Trial Court should have ordered a prompt hearing so that all issues of law and questions of fact could have been aired.

POINT THREE

The appellant believes that the Court of Appeals should reverse and remand the decision of the District Court and Order a Hearing before a different district Court Judge.

STATEMENT OF FACTS

The Appellant Joseph Gentile was sentenced to a term of four years imprisonment for the Crime of Bribery by the Hon. Mark Constantino, U.S. District Court Judge for the Eastern District of New York on May 31, 1975. On the 29th of October, 1976 that sentenced was modified to be effective under the terms of 18 U.S.C. 4205 (b) (2).

During the Appellant's initial Parole Hearing conducted in December, 1976, the appellant was repeatedly questioned about his involvement in a widespread gambling conspiracy in 1972. That indictment had been dismissed by the Hon. John R. Bartels, U.S. District Court Judge for the Eastern District of New York. The Appellant was informed that almost all of the data in his pre-sentence investigation dealt with that dismissed case, and not the instant case for which the appellant stands convicted.

On or about the 10th day of January, 1977, the Appellant filed a Petition for vacation of sentence, pursuant to Title 28 U.S.C. 2255, charging that the trial court and the Parole Board utilized a dismissed indictment when sentencing him and when considering him for parole.

On January 20, 1977, Hon. Mark Constantino dismissed that Petition sua sponte.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN DISMISSING
THE APPELLANT'S PETITION SUA SPONTE

The Appellant argues that the District Court was in error when it dismissed his petition sua sponte. The United States Court of Appeals for the Second Circuit in Lewis v. New York, ___ F.2d ___, [docket#76-2061, 10-26-76] said, " We have criticised sua sponte dismissals of pro se complaints in several recent cases emanating in the Northern District.", Judge Kaufman continued, " Great circumspection is required before terminating such actions, particularly in their embryonic stages. It is prudent for Judges to avoid an inquisitorial role and not search out issues more appropriately left to a motion by the opposing party." The United States Supreme Court in Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 40 L.Ed 2d 90 (1974) said, "When a Federal Court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on grounds of lack of

jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." [416 U.S. 232 at 236]

POINT II

THE DISTRICT COURT ERRED IN NOT GRANTING A HEARING TO SEARCH OUT ALL THE ISSUES OF LAW AND QUESTIONS OF FACT.

Title 28, United States Code, Section 2255 provides in pertinent part,

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon (emphasis added), determine the issues and make findings of fact and conclusions of law with respect thereto. If the Court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack or that there has been such a denial or infringement of the Constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate."

The appellant argues that if indeed, the trial Court did consider the dismissed indictment when passing sentence, that sentence is open to collateral attack. The Appellant had been unaware of the fact that his pre-sentence Investigation was more concerned with the dismissed 1972 indictment, then with the instant offense. One of the basic tenets of criminal law is "An arrest record, without more, is a fact that is absolutely irr-

elevant to the question of an individual's criminal culpability." Utz v. Cullinane, 520 F.2d 467. The United States Supreme Court in Michaelson v. United States, 335 U.S. 469, 482, 69 S. Ct. 213, 222, 23 L.Ed 168 (1948) said, "The Government knows that a derogatory inference will often nevertheless be drawn that the person who was arrested is also guilty of the crime charged. The mere fact of an arrest may impair or cloud a persons reputation."

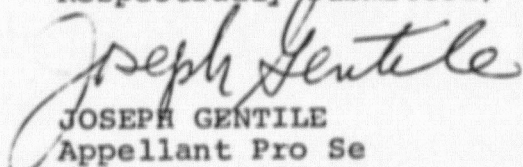
The appellant when being sentenced, was unaware that the pre-sentence report dealt at great length with a dismissed indictment, and the District Court Judge should have permitted the appellant to object to its presence. In any event, the District Court should have ordered a hearing, so that the issues could have been aired.

SUMMARY

The appellant Joseph Gentile, respectfully prays this honorable court to reverse the dismissal of his Petition to Correct or Vacate sentence pursuant to 28 U.S.C. 2255 and prays that the Petition be remanded to a different District Court Judge. The appellant alleges that the Hon. Mark Constantino may have already drawn inferences and conclusions and in the interest of Justice another District Court Judge should be assigned. See. United States v Rosner, 485 F.2d. 1213, 1231;

United States v. Schwartz, 500 F.2d 1350,1352, (2nd
Circ. 1974),; O'Shea v. United States, 491 F.2d 774,
778-80 (1st Circ); Wingo v. Wedding , 418 U.S. 461,473
n.19 (1974; United States v. Stein, ____ F.2d____,
[docket #76-1299, 2nd Circ. 1976] and United States
v. Robins, ____ F.2d____, [2nd Circ. 1976].

Respectfully submitted;


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JOSEPH GENTILE

UNITED STATES OF AMERICA

28 USC 2255

CAUSE

Motion to vacate, inmate

Related case- 72-CR-1232 (Costantino, J.)

ATTORNEYS

FOR PLTFF:

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☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARD	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MA
				JS-5	
				JS-6	

77C 36

GENTILE -v- USA

DATE	NR.	PROCEEDINGS
1/6/77		Motion to vacate ,correct or modify sentence.
-13-77		Letter dtd 12-30-76 to J. Costantino from petitioner, re parole.
/21/77		By Costantino, J Order dtd 1/20/77 filed re petitioner's contentions are w/o merit , the motion is denied. (3)
1/21/77		Judgement dtd 1/21/77 filed re ordered and adjudged that the XXXXXXXXXX applicat (4)
1/31/77		under 28 USC 2255 is denied.
2-16-77		Notice of appeal filed and copy sent to C of A. (5)
2-16-77		Civil appeal scheduling order filed. (6)
2-16-77		Entire file certified and mailed to C of A. mg

